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No. 86-227

In the Supreme Court of the United States

OCTOBER TERM, 1986

VICTOR RIDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

PATRICK A. HEWITT
Capt., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

VITO A. CLEMENTI
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013

QUESTION PRESENTED

Whether the admission at petitioner's court-martial of the laboratory report of petitioner's urinalysis test violated the Confrontation Clause.

TABLE OF CONTENT

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463	6
Barnes v. *United States*, 412 U.S. 837	6
Commonwealth v. *Harvard*, 356 Mass. 452, 253 N.E.2d 346	8, 11
Commonwealth v. *McCloud*, 457 Pa. 310, 322 A.2d 653	8
Coulter v. *State*, 494 S.W.2d 876	8
Dutton v. *Evans*, 400 U.S. 74	9
Howard v. *United States*, 473 A.2d 835	8, 10, 11
Kay v. *United States*, 255 F.2d 476, cert. denied, 358 U.S. 825	8, 10, 11, 12
McDaniel v. *United States*, 343 F.2d 785, cert. denied, 382 U.S. 826	8
Moon v. *State*, 300 Md. 354, 478 A.2d 695, cert. denied, 469 U.S. 1207	8
Ohio v. *Roberts*, 448 U.S. 56	8, 9
Phillips v. *Neil*, 452 F.2d 337, cert. denied, 409 U.S. 884	12
State v. *Cosgrove*, 181 Conn. 562, 436 A.2d 33	8, 10
State v. *Henderson*, 554 S.W.2d 117	8
State v. *Kreck*, 86 Wash. 2d 112, 542 P.2d 782	8
State v. *Larochelle*, 112 N.H. 392, 297 A.2d 223	8
State v. *Malsbury*, 186 N.J. Super. 91, 451 A.2d 421	8

Cases—Continued: Page

State v. *Smith*, 312 N.C. 361, 323 S.E.2d 316 ..... 8, 12
United States v. *Beasley*, 438 F.2d 1279, cert. denied, 404 U.S. 866 12
United States v. *Evans*, 21 C.M.A. 579, 45 C.M.R. 353 7
United States v. *Inadi*, No. 84-1580 (Mar. 10, 1986) 8, 11
United States v. *Miller*, 23 C.M.A. 247, 49 C.M.R. 380 7
United States v. *Oates*, 560 F.2d 45 9
United States v. *Parker*, 491 F.2d 517, cert. denied, 416 U.S. 989 8
United States v. *Strangstalien*, 7 M.J. 225 7
United States v. *Vietor*, 10 M.J. 69 ..... 7, 11
United States v. *Ware*, 247 F.2d 698 8

Constitution, statute, and rules:

U.S. Const. Amend. VI (Confrontation Clause) 6, 8, 9, 10, 11, 12, 13
Uniform Code of Military Justice, 10 U.S.C. (& Supp. III) 801 *et seq.*:
Art. 60, 10 U.S.C. (Supp. III) 860 2
Art. 90, 10 U.S.C. 890 2
Art. 134, 10 U.S.C. 934 2
Fed. R. Evid. 803(6) 7, 9
Mil. R. Evid. 803(6) 4, 6, 7

Miscellaneous:

E. Cleary, *McCormick's Handbook of the Law of Evidence* (2d ed. 1972) 9
Dep't of Army Reg. 600-85, *Interim Change No. I03, Alcohol and Drug Abuse Prevention and Control Program* (Apr. 29, 1983) 11
DOD Directive No. 1010.1 (Dec. 28, 1984) 13
4 D. Louisell & C. Mueller, *Federal Evidence* (1980) 9, 10
Manual for Courts-Martial, Rule for Court Martial 703 (1984) 4, 7, 11

Miscellaneous—Continued: Page

Office of the Surgeon General, Dep't of the Army, *Standing Operating Procedure: Chain of Custody Procedures for Collection, Handling and Testing of Urine Specimens* (May 25, 1983) ..3, 4, 7, 10
Review of Urinalysis Drug Testing Program—Legal Addendum (Dec. 12, 1983) 14
4 J. Weinstein & M. Berger, *Weinstein's Evidence* (1985) 9
5 J. Wigmore, *Evidence in Trials at Common Law* (J. Chadbourne rev. ed. 1974) 9

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-2a) is reported at 22 M.J. 351. The opinion of the Army Court of Military Review (Pet. App. 3a-4a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 16, 1986. The petition for a writ of certiorari was filed on August 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a special court-martial at Fort Ord, California. Petitioner was convicted of the willful disobedience of a superior commissioned officer, in violation of Article 90 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, and of the wrongful use of marijuana, in violation of Article 134, UCMJ, 10 U.S.C. 934. He was sentenced to two months' confinement, a bad conduct discharge, partial forfeiture of his pay, and a reduction in rank. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (Supp. III) 860, and approved the sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 3a-4a). The Court of Military Appeals affirmed in a memorandum opinion (Pet. App. 1a-2a).

1. The first charge against petitioner—the wrongful use of marijuana—stemmed from an incident that occurred on July 8, 1983. On that day, Lieutenants Bryan Sampson and Michael Boss and Staff Sergeant Ellis Kendall, Jr., noticed the strong odor of marijuana emanating from a room assigned to enlisted men John Treadway and Robert Anthony (Tr. 27, 60). Upon entering the room, Lieutenants Sampson and Boss and Sergeant Kendall discovered petitioner, Treadway, and Anthony. A search of the room revealed marijuana in several areas controlled by Anthony, as well as a large amount of marijuana in a common area (*id.* at 33, 63-67, 99-101). Approximately five days later, petitioner was ordered to submit a urine sample for testing (*id.* at 88). That sample tested positive for marijuana (GX 8).

The other charge against petitioner—willful disobedience of an order by a superior commissioned

officer—arose from his refusal to provide a second urine sample two months later. In September 1983, petitioner appeared to be under the influence of an intoxicant while he was on base, and he was ordered to provide a urine sample. Although he was given several opportunities to provide a sample, petitioner refused to do so (Tr. 37-44, 103-107, 151-154, 155-157). Petitioner does not challenge his conviction for that offense.

2. At trial, petitioner's counsel indicated in his opening statement that he would object to the government's introduction of the laboratory report of petitioner's positive urinalysis result, on the ground that it was "contrary to the best evidence rule" and denied him the opportunity to cross-examine the persons who had performed the urinalysis tests (Tr. 21-22). During trial, the trial judge took judicial notice (*id.* at 169) of the document that establishes guidelines for the secure handling and testing of samples processed through all Army drug testing laboratories. Office of the Surgeon General, Dep't of the Army, *Standing Operating Procedure: Chain of Custody Procedures for Collection, Handling and Testing of Urine Specimens* (May 25, 1983) [hereinafter cited as *Urine Testing SOP*].[1] The *Urine Testing SOP* provided the

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[1] The guidelines provide that each urinalysis laboratory report must contain the following certification, signed by a laboratory certifying official (*Urine Testing SOP* 9):

> "I certify that I am a laboratory certifying official and that I am the official records custodian of this laboratory. I further certify that the attached DA Form 5180-1-R (Test), with gas chromatography tracing attached, and DA Form 5180-2-R (Test) were prepared in accordance with official procedure promulgated by The Surgeon General and in the regular course of business of this laboratory, and that they are true and accurate copies of the

necessary foundation for the admission of the laboratory report of petitioner's urinalysis test under Mil. R. Evid. 803(6).[2] Petitioner objected to the introduction of the test result, on the grounds that it was "not the best evidence and does not give the accused the opportunity to cross-examine" (Tr. 170).[3] Petitioner did not attempt to compel the production of any laboratory personnel, nor did he in any manner challenge the reliability of the tests.[4] Instead, his

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originals kept in the official files of this laboratory and maintained by me."

The laboratory report on petitioner's urine specimen contained that certification (GX 8, at 1).

[2] The prosecution also called Mr. Daryle Olsen, chief of the alcohol and drug abuse prevention and control program (Tr. 129). He testified about some of the testing procedures and minimum levels of THC required for a positive test result (*id.* at 132-133). He was cross-examined, but the defense did not attempt to attack the reliability of the urinalysis test or its scientific underpinnings (*id.* at 134-138, 141-142).

[3] As required by the *Urine Testing SOP* (at 1), petitioner's urine specimen was tested twice, first by radioimmunoassay (RIA) and then by both RIA and gas-liquid chromotography (GC). Only after both tests were performed was petitioner's specimen identified as positive (GX 15).

[4] Those individuals could have been called, and their production would have been at government expense. See, *e.g.*, *Manual for Courts-Martial,* Rule for Court Martial 703 (1984) [hereinafter cited as *Manual,* RCM]. Petitioner's failure to request their presence at trial is perhaps best explained by the fact that his urine sample was retested by another testing procedure (gas chromotagraphy/mass spectroscopy), which he concedes is reliable (Pet. 11 n.19) and which confirmed the results of the test on which his conviction is based. An electronic message confirming the result of that test was offered into evidence (GX 12), but was excluded by the military judge because "[t]here [had] not been an ade-

defense to the charge of wrongfully using marijuana was that his urine sample had been switched with those of his roommates or that his positive test result was attributable to passive inhalation (*id.* at 23, 136-137, 201, 211-212).

ARGUMENT

1. Petitioner does not challenge his conviction for willfully disobeying a superior commissioned officer by refusing to provide a urine sample when ordered to do so in September 1983. The trial judge's remarks at sentencing make clear that the sentence petitioner received was imposed because he had failed to comply with a lawful order, not because he had wrongfully used marijuana.[5] It is therefore most unlikely that

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quate foundation laid for introduction" (Tr. 170). Had petitioner taken affirmative steps to procure the technicians of whose absence he now complains, he would have enabled the prosecution to lay the proper foundation for admitting that test result.

[5] As the trial judge stated at sentencing (Tr. 239-241):

> Well Specialist Ridley, I have considered the character or your service, approximately five years in the service, according to my calculations; the fact that you've received a good conduct medal, I don't see any evidence that you've ever been reduced at anytime in your career, and the testimony indicates that both in Hawaii and here at Fort Ord you have been an above average soldier and have done your job. And I also believe that a soldier is entitled to one mistake. You had that opportunity, when that incident occurred on the 8th of July when you were found in that room full of cigarette—marihuana cigarette smoke, and you submitted to a urinalysis that came up positive, and you were under charges. During that period of time when you were under charges, you were again requested to and then ordered to take a urinalysis by your company commander who carefully explained the

petitioner's sentence would be affected even if his conviction for wrongfully using marijuana were set aside. In these circumstances, review by this Court of petitioner's claim is unwarranted, because even complete acceptance of his argument would afford him no practical benefit. Cf. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 & n.16 (1973).

2. Petitioner argues that the admission of the laboratory test results under the authority of Mil. R. Evid. 803(6) violated his rights under the Confrontation Clause.

a. Military Rule of Evidence 803(6) provides that a report of acts or events is not excluded by the hearsay rule if four requirements are met: (1) the report

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consequences of a refusal to take urinalysis, and you continued to refuse to submit a urinalysis sample. The proper answer to the company commander would have been at that time, "yes, sir, I will if I have to stay here all night, I'll give my urinalysis sample." You had no legal right, and that was explained to you, to refuse that urinalysis. That defiance of authority cannot be tolerated. I consider that to be the serious offense on trial here today. And indeed, you probably wouldn't have been here at all at trial, or at least not even facing the prospect of a punitive discharge had you not committed the additional disobedience on the 29th of September, that's where you made your largest mistake, I believe, the way I view the evidence in this court.

Although I have to give weight to the character of your service and your potential for rehabilitation, I also have to insure that the military justice system works, that the chain of command is respected, and that orders of superior officers over you to whom you gave an oath, is maintained. Accordingly, I'm prepared to announce my sentence. Will you and your counsel please rise.

The trial court then imposed petitioner's sentence.

was made at or near the time that the acts or events occurred; (2) the report was made by a person with knowledge of the subject of the report; (3) the report was made in the course of a regularly-conducted business activity; and (4) the regular practice of the business is to make such a report. *Manual* III-36. Rule 803(6) also specifically identifies "forensic laboratory reports" as being among the category of reports that fit within this exception (*ibid.*), in recognition of the fact that forensic laboratories function as "impartial examining centers" and that a laboratory report is "simply a record of 'regularly conducted' activity of the laboratory" (*Manual* App. 22, at A22-44). In this case, the *Urine Testing SOP* (GX 15) established the foundation requirements under Rule 803(6) for admission of the report of petitioner's urinalysis test. Petitioner does not argue that the test results were inadmissible under the rule. It is his contention that the provision of the rule permitting the admission of laboratory test results is unconstitutional.

The Court of Military Appeals has consistently held that laboratory reports made in the normal course of business and properly authenticated are admissible as business records, and that the Confrontation Clause does not require their exclusion.[6] Several federal courts of appeals and state courts of last resort have also upheld the receipt of laboratory reports over

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[6] See *United States* v. *Vietor*, 10 M.J. 69, 70-71 (C.M.A. 1980); *id.* at 74-75 & n.4 (Everett, C.J., concurring in the result); *United States* v. *Strangstalien*, 7 M.J. 225, 227-229 (C.M.A. 1979); *United States* v. *Miller*, 23 C.M.A. 247, 49 C.M.R. 380, 381 (1974); *United States* v. *Evans*, 21 C.M.A. 579, 581-582, 45 C.M.R. 353, 355-356 (1972); see also *Manual*, App. 22, at A22-44. Mil. R. Evid. 803(6) mirrors Fed. R. Evid. 803(6).

Confrontation Clause objections.[7] The only federal

[7] See, *e.g.*, *Kay* v. *United States*, 255 F.2d 476, 480-481 (4th Cir.), cert. denied, 358 U.S. 825 (1958) (laboratory analysis of blood alcohol level); *United States* v. *Ware*, 247 F.2d 698, 699-700 (7th Cir. 1957) (laboratory analysis of drugs); *State* v. *Cosgrove*, 181 Conn. 562, 568-585, 436 A.2d 33, 37-44 (1980); *Howard* v. *United States*, 473 A.2d 835, 838-840 (D.C. 1984); *Commonwealth* v. *Harvard*, 356 Mass. 452, 462-463, 253 N.E.2d 346, 352 (1969); *State* v. *Larochelle*, 112 N.H. 392, 394-397, 297 A.2d 223, 225-226 (1972); *State* v. *Malsbury*, 186 N.J. Super. 91, 98-101, 451 A.2d 421, 425-426 (1982); *State* v. *Smith*, 312 N.C. 361, 364-386, 323 S.E.2d 316, 318-330 (1984); *Coulter* v. *State*, 494 S.W.2d 876, 881-884 (Tex. Crim. App. 1973); *State* v. *Kreck*, 86 Wash. 2d 112, 117-121 & n.3, 542 P.2d 782, 786-788 & n.3 (1975); see also *United States* v. *Parker*, 491 F.2d 517, 520-521 (8th Cir. 1973), cert. denied, 416 U.S. 989 (1974); cf., *e.g.*, *McDaniel* v. *United States*, 343 F.2d 785, 789 (5th Cir.), cert. denied, 382 U.S. 826 (1965) (the Confrontation Clause does not bar receipt of a firm's internal investigative report as a business record).

Petitioner errs in asserting (Pet. 5 n.5) that the decision below conflicts with several state court decisions. *Moon* v. *State*, 300 Md. 354, 369-371, 478 A.2d 695, 703 (1984), cert. denied, 469 U.S. 1207 (1985), held that the Sixth Amendment forbade the introduction of a blood alcohol report as a business record where there were discrepancies on the face of the report. *Commonwealth* v. *McCloud*, 457 Pa. 310, 322 A.2d 653 (1974), relied on the state constitution to exclude a medical examiner's report of the cause of death. Finally, although *State* v. *Henderson*, 554 S.W.2d 117 (Tenn. 1977), ruled that the Confrontation Clause forbids the admission of a laboratory report of a drug test unless the laboratory analyst testifies at trial, that case, like *Moon*, relied on an interpretation of *Ohio* v. *Roberts*, 448 U.S. 56 (1980), that the Court rejected last Term in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986). *Inadi* ruled that the unavailability requirement discussed in *Roberts* only applied to prior testimony. Slip op. 8. Thus, the courts that have excluded laboratory reports may well alter their views in light of this Court's decision in *Inadi*. Review of this question is therefore inappropriate at this time.

case that petitioner claims to be in conflict with those decisions is *United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977). In that case, however, the court held only that the laboratory report did not fall within the reach of federal rule 803(6), which, unlike the military rule, does not expressly provide for the admission of laboratory test results. The *Oates* court did not decide whether the Confrontation Clause would have barred the admission of the laboratory report (560 F.2d at 80), although the court noted that the report in that case bore special indicia of unreliability that would have made the Confrontation Clause issue a difficult one (*id.* at 81).

This Court has indicated that the Confrontation Clause does not forbid the receipt of evidence as a business record. *Ohio* v. *Roberts*, 448 U.S. 56, 66 n.8 (1980) (citation omitted) (" 'Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions.' "); *Dutton* v. *Evans*, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring in the result). The business records exception, which has roots deep in the common law,[8] rests on the principle that records prepared in the normal course of business are highly accurate and reliable and thus may be admitted at trial without adversely affecting the fact-finding process.[9] That

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[8] Wigmore traces the lineage of the exception to the early seventeenth century. 5 J. Wigmore, *Evidence in Trials at Common Law* § 1518, at 427 (J. Chadbourne rev. ed. 1974).

[9] See, *e.g.*, E. Cleary, *McCormick's Handbook of the Law of Evidence* § 306, at 720 (2d ed. 1972); 4 D. Louisell & C. Mueller, *Federal Evidence* § 446, at 646-647 (1980); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(6)[01], at 806-176 (1985). In fact, such records will often be more reliable than the testimony of the persons who recorded the informa-

principle is applicable in the case of laboratory reports, just as in the case of other types of business records. Laboratory analyses are routinely performed by laboratory technicians who have no motive to falsify the report of the results.[10] While the laboratory tests themselves may be subject to challenge as unreliable, the flaws, if any, in the testing technique are not addressed by the Confrontation Clause claim raised here.

Petitioner's claim is that he was denied the opportunity to cross-examine the laboratory technician about the accuracy of the entries the technician made on the laboratory report. Cross-examining the technician, however, would not address petitioner's real objection—the claim that the urinalysis test itself was unreliable. Thus, petitioner's claim in this case is misfocused. The Confrontation Clause does not require that an out-of-court laboratory test be reliable; the Clause requires only that the report of such a test be reliably prepared. Where laboratory reports are routinely prepared in accordance with the provisions set forth in the *Urine Testing SOP*, the likeli-

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tion onto the records, given the large number of records and entries that must often be made by a business. 4 D. Louisell & C. Mueller, *supra*, § 446, at 646.

[10] See, *e.g.*, *Kay* v. *United States*, 255 F.2d at 481; *Howard* v. *United States*, 473 A.2d at 839; *State* v. *Cosgrove*, 181 Conn. at 568-572, 436 A.2d at 37-39. As the Fourth Circuit explained in *Kay* v. *United States*, in the context of a laboratory report identifying the defendant's blood alcohol content: "The alcoholic content of the blood, the evidentiary fact sought to be proved by the certificate, may be accurately determined by well recognized chemical procedures. It is an objective fact, not a mere expression of opinion, and its proof by introduction of the certificate violates no constitutional right of the defendant." 255 F.2d at 481.

hood that the report was reliably prepared is sufficiently high that the Confrontation Clause does not require live testimony on the issue. Of course, if petitioner had seriously believed that there was a flaw in the manner by which the report was prepared, he was free to call the laboratory analyst to the stand to testify. Cf. *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 9-10.[11]

b. Petitioner argues (Pet. 5-8) that the laboratory report should have been excluded, because the urinalysis was performed at a so-called "police laboratory" for the purpose of litigation and because the determination that his urine sample contained marijuana was an evaluative opinion. Both claims are in error. The Army's drug testing program serves a number of functions other than producing evidence for court-martial proceedings.[12] And petitioner has failed to

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[11] *Manual*, RCM 703; see also, *e.g.*, *Kay* v. *United States*, 255 F.2d at 481; *United States* v. *Vietor*, 10 M.J. at 77; *Howard* v. *United States*, 473 A.2d at 839; *Commonwealth* v. *Harvard*, 356 Mass. at 460, 253 N.E.2d at 351.

[12] Dep't of Army Reg. 600-85, *Interim Change No. I03, Alcohol and Drug Abuse Prevention and Control Program* para. 3-16a, at 2 (Apr. 29, 1983), states that the objectives of the Army's urinalysis program are:

1. To determine a member's fitness for duty and the need for counseling, rehabilitation, or other medical treatment.

2. To determine the presence of controlled substances in a member's urine or blood alcohol content during participation in the [Alcohol And Drug Abuse Prevention And Control Program].

3. To gather evidence to be used in actions under the Uniform Code of Military Justice (UCMJ).

identify any "evaluative" aspect of the urinalysis testing procedure.[13] Thus, because the laboratory personnel who analyzed petitioner's urine sample played a non-evaluative role, they were not witnesses "against" him, and the Confrontation Clause does not apply. *United States* v. *Beasley*, 438 F.2d 1279, 1281 (6th Cir.), cert. denied, 404 U.S. 866 (1971). Cf. *Phillips* v. *Neil*, 452 F.2d 337, 347-349 (6th Cir. 1971), cert. denied, 409 U.S. 884 (1972) (admission of medical record containing psychiatric opinion regarding the defendant's mental condition violated the defendant's right of confrontation).

c. Petitioner also claims (Pet. 9-11) that the urinalysis test performed on his specimen was unreliable. Petitioner did not object at trial to the admission of the laboratory report on that ground. Instead, he claimed that the laboratory report was not the "best evidence" and that he was entitled to cross-examine the laboratory analyst (Tr. 170; see *id.* at 211-213). Petitioner has therefore waived that claim by failing

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4. To gather evidence to be used in administrative actions.

5. To determine the presence of controlled substance in a member's urine or blood alcohol content for a valid medical purpose.

6. To serve as a safeguard at social gatherings where alcohol beverages are served to individuals who might otherwise not realize how much alcohol they have consumed.

[13] See *Kay* v. *United States*, 255 F.2d at 481; *State* v. *Smith*, 312 N.C. at 372-374, 323 S.E.2d at 323 (scientific advances in measuring blood alcohol concentration have removed the necessity for a subjective finding of impairment and have increasingly reduced the role of the operator in the objective determination of blood alcohol concentration).

to raise it at a time when the validity of his assertions could have been tested.[14]

In any event, petitioner's argument that the particular test performed in his case is unreliable is properly presented not as a claim that the admission of the laboratory report of that test violated the Confrontation Clause, but as a claim that the evidence was insufficient to support his conviction for the wrongful use of marijuana, because the urinalysis test itself was unreliable. That claim does not warrant review by this Court, because it is unlikely to recur. In 1984, the Department of Defense directed that the gas chromatography-mass spectrometry test, which petitioner agrees is reliable (Pet. 11 n.19), be used as the confirmation test in all urinalysis examitions. DOD Directive No. 1010.1 (Encl. 2), at 3-2 (Dec. 28, 1984). Accordingly, the question whether the urinalysis tests performed in this case were reliable is of no continuing importance.[15]

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[14] This is particularly true since the positive result of the testing procedure that petitioner now challenges was confirmed by another test procedure (see pages 4-5 note 4, *supra*) that petitioner concedes is reliable (Pet. 11 n.19). The trial judge excluded an electronic message regarding the confirmation test result on the ground that the government did not lay the proper foundation for admission. Pages 4-5 note 4, *supra*. If petitioner had challenged the reliability of the testing procedures used on his urine sample in a timely manner, the government could have easily taken the time to lay the proper foundation for the admission of the confirmation test.

[15] Contrary to petitioner's assertions, the testing procedures used in this case have been found reliable. "[A]t Fort Meade, the GC/MS [gas chromatography/mass spectroscopy] retest of 816 samples confirmed the presence of THC in 812 of the samples identified by RIA-GC. At the Naval Drug Screening

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

PATRICK A. HEWITT
Capt., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

VITO A. CLEMENTI
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

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Laboratory in San Diego, the figure was equally impressive: 99.7%. These figures lend hard, empirical support to the contention that used together, RIA and GC procedures are sufficiently specific." *Review of Urinalysis Drug Testing Program —Legal Addendum* at 19 (Dec. 12, 1983).

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